

CASE NO.:
Writ Petition (civil) 27 of 2007

PETITIONER:
Supreme Court Bar Association

RESPONDENT:
Union of India & Ors

DATE OF JUDGMENT: 13/04/2007

BENCH:
Dr. ARIJIT PASAYAT & D.K. JAIN

JUDGMENT:
J U D G M E N T

Dr. ARIJIT PASAYAT, J.

This petition under Article 32 of the Constitution of India, 1950 (in short the 'Constitution') has been filed by the Supreme Court Bar Association raising points of considerable importance. It is the case of the writ petitioner that appointment of a retired Judge as Chairman of the concerned State Legal Service Authority in different States falls foul of the desired legislative effect. It is stated that appointment of retired Judges has the effect of stalling the effectiveness in functioning of the State Legal Service Authorities. With reference to Section 6(2) of the Legal Services Authorities Act, 1987 (in short the 'Act'), it is pointed that the serving or retired Judge of the High Court can be nominated by the Governor in consultation with the Chief Justice of the High Court. The writ petitioner has pointed out that under the Act the State Government is required to constitute a body to be called the Legal Service Authority of the State to exercise the powers and/or assigned to State Authority under the Act. Sub-section (2) of Section 6 provides that the State Authority shall consist of the Chief Justice of the High Court who shall be the Patron-in-Chief and a Judge of the High Court to be nominated by the Governor in consultation of the Chief Justice of High Court who shall be the Executive Chairman.

Several difficulties encountered in case a retired Judge is appointed as a Chairman, have been highlighted by the writ-petitioner. Most of the States and the Union Territories have accepted the genuineness of the problems highlighted in the writ petition. It is to be noted that except four States i.e West Bengal, Uttar Pradesh, Uttranchal and Manipur, in other States and the Union Territories a sitting Judge is functioning as Executive Chairman. In the State of Orissa prior to passing of the impugned order dated 12.1.2007 a retired Judge had been appointed as the Executive Chairman. In line with the order dated 12.1.2007 presently in the State a retired Judge is functioning as the Executive Chairman. One of the main grievances of the writ petitioner-association is that there is scope for favouritism in case a retired Judge is appointed in preference to a sitting Judge. Several instances have been highlighted. In its affidavit filed by the National Legal Service Authority (in short 'NALSA'), it has been accepted that the functioning of the State Legal Service Authorities where retired Judges have been appointed as Chairmen is not satisfactory. The averments in the writ petition which need to be

highlighted is as follows:

"Whereas in regard to the State Legal Authority alone, strangely, the head need not be a sitting High Court Judge. The relevant provisions of the Act regarding State Legal Service Authority contained in Section 6(2) are as follows:

"(2) A State authority shall consist of-
(a) the Chief Justice of the High Court who shall be the Patron-in-Chief;

(b) A serving or retired Judge of the High Court, nominated by the Governor, in consultation with the Chief Justice of the High Court, who shall be the Executive Chairman; and

(c) such other members, possessing such experience and qualifications as may be prescribed by the State Government, to be nominated by the Government in consultation with the Chief Justice of the High court."

The Authority could be headed by a retired judge of the High Court. For a retired judge, the Act does not prescribe any upper age-limit. In regard to every other Tribunal, the Act concerned itself prescribes the upper age limit as 68 years or 5 years tenure. This Act alone does not prescribe any age limit, or a limited tenure, when it comes to a retired judge. For a sitting judge all limitations as to age etc. come automatically since he would hold the post ex officio.

The position of the chairperson of Legal Services Authority at State Level is very crucial. A sitting judge will be a far better person and he can exercise his powers more effectively compared to a retired Judge. Since the head of National Legal Services Authority has to be the Chief Justice of India and the head of the District Legal Services Authority has to be the District Judge, the scheme of the Act should be understood to be that the head of the State Legal Services Authority also should be a sitting Judge of the High Court.

Moreover, the provision appears to suggest that the 1st choice has to be a sitting Judge, and only when it is not possible to appoint a sitting Judge, in the alternative, a retired Judge could be considered. The State Govt. cannot avoid a sitting Judge and go in for a retired Judge straight away.

Even otherwise, when one analyses functions of the State Legal Services Authority, it would be more appropriate to have a sitting Judge as its head for effective implementation of the objects of the Act. The following are the main functions of the Legal Services Authority at the State Level:

(a) To give effect to the policy and directions of the Central Authority.

(b) Give legal service to persons who satisfy the criteria laid down under this Act;

(c) Conduct Lok Adalats;

(d) Undertake preventive and strategic legal aid programmes; and

(e) Perform such other functions as the State Authority may, in consultation with the Central Government, fix by regulations.

Most of the functions are intrinsically interwoven with the duties and the powers of the High Court under Article 235 and other Articles of the Constitution. Even if it is felt that a retired Judge may be of help, one retired Judge could be accommodated as one of the members of the State Legal Services Authority.

The petitioner has come to know that in various States in the country there is a move to take away the Legal Services Authority from the control of the respective High Court."

It is submitted that even where retired Judges are appointed to head the Commission, it becomes a never-ending process.

In the affidavit filed by NALSA it has been stated as follows:

"It is the respectful submission of NALSA that on a true interpretation of the provisions of the Act, its Preamble and Statements of Objects and Reasons on one hand and the Constitutional Scheme under Article 39A and Article 21 and the law declared by this Hon'ble Court on the other, demand that it would be not only just and proper but desirable to nominate a serving Judge of the High Court by the Governor, in consultation with the Chief Justice of the High Court, to be the Executive Chairman.

Section 7 of the Act lays down the "functions of the State Authority" which include besides effectuating policy and directions of the Central Authority the following:-

(a) give legal service to persons who satisfy the criteria laid down under this Act;

(b) conduct Lok Adalats; including Lok Adalats for High Court cases;

(c) undertake preventive and strategic legal aid programmes; and

(d) perform such other functions as the State Authority may, in consultation with [Central Authority,] fix by regulations.

Section 8 requires the State Authority to act in coordination with other Governmental Agencies, non-Governmental Voluntary Service Institution, Universities, other bodies engaged in a work of promoting the cause of Legal Services to the poor as

also with the Central Authority.

It is submitted that the Objectives underlying Sections 7 & 8 may be better achieved with the Constitution of the State Authority in a manner so as to nominate a sitting Judge as its Executive Chairman. It is respectfully submitted that a Sitting Judge of the Hon'ble High Court may be able to deal more effectively with Judicial Officers, Government Officials and Departments. Furthermore, if the nomination of a retired Judge as the Executive Chairman becomes a rule rather than the exception, it will become another office to be offered to a retired Judge who will not be in a position to effectively deal with NGOs, Government Authorities or the Judicial Officers including District Judges and even to persuade the sitting Judges to participate in the Legal Aid Programmes and activities of the State Authority.

It is further submitted that under the Act Permanent Lok Adalats have to be set up in the Government Departments. For this purpose, the Executive Chairman has to interact with the Chief Ministers and other Ministers and the Hon'ble Chief Justice of the concerned High Court. Interaction between a sitting Judge and the Chief Justice can be more effective and fruitful.

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It is submitted that to the best information of NALSA, as at present, four States have nominated retired High Court Judges to be the Executive Chairman of State Authorities constituted and working in those States. These States are Meghalaya, Uttrakhand, Uttar Pradesh and West Bengal having issued Notification accordingly on 15.7.1998, July 2003, 20.12.2004 and 10.8.2005 respectively."

Learned Additional Solicitor General appearing for the Union of India has stated that the stands taken in the writ petition merit acceptance.

Though the allegation of any preferential treatment has been denied in the affidavits of all States, we would like to illustrate the State of Orissa's case. The fact situation is quite disturbing. This Court directed production of file relating to appointment of the retired Judge as Executive Chairman. The Registrar of the Orissa High Court in a communication to this Court stated that there was no file available in the High Court and he had collected copies of certain documents from the Principal Secretary of the Chief Justice of the High Court.

This Court by letter dated March 30, 2007, sought for clarification as to under what circumstances record/file was not maintained and as to how the documents were in the possession of the Principal Secretary without they being brought on record. The statement of the Principal Secretary is very revealing and disturbing. The relevant parts of the statement read as follows:

"That on 13.12.2006 the then Hon'ble

Chief Justice (xxx xxx xxx xxx) directed me to give an Issue Number of the Issue Register maintained by me in the residential office of Hon'ble Chief Justice.

Accordingly, I gave a Number of my Issue Register bearing No.538/C.J.Res. Dated 13.12.2006 to Hon'ble the then Chief Justice. Since I was not aware of the contents of the letter to be dispatched in order to make the required entry of the subject-matter of the letter in the relevant column of the Issue Register maintained in the residential office of Hon'ble C.J. against the next serial number which I mentioned before Hon'ble Chief Justice on 13.12.2006, I humbly requested His Lordship to indicate the subject-matter and the name of the address of the letter. Thereupon His Lordship was kind enough to disclose the subject-matter and the name of the addressee to me which I mentioned in the Issue Register.

That I am to humbly state that my assistance was not at all taken in the preparation/typing out of the letter issued under the above dispatch Number.

That some times confidential letters are issued by the Hon'ble Chief Justice and for that purpose an Issue Register is maintained in the residential office of Hon'ble Chief Justice and office copies of all such letters issued from the residential office of Hon'ble Chief Justice are kept in the residential office files.

I, therefore, humbly request the Hon'ble Chief Justice for the office copy of the said letter since the Issue Number was given from the Issue register maintained in the residential office of Hon'ble Chief Justice, but the office copy of the said letter was not given to me on that date, which fact I have reflected in the Issue Register to the effect that "office copy of the letter is with Hon'ble C.J.".

It is humbly further stated that only on 17.1.2007 Hon'ble the Chief Justice made over the office copy of the D.O. letter No.538/C.J.Res dated 13.12.2006 to me along with letter No\005...-L dated 8.12.2006 written by (xxx xxx xxx) Minister of Law to the Hon'ble Chief Justice and His Lordship directed me to keep the said two letters in a separate file. Accordingly I had kept the above two letters in a separate file. But in regular course of my official business, I have also reflected the fact of receipt of the office copy of the said letter on 17.1.2007 in the Issue Register. The true xerox copy of the relevant page of the Issue Register is annexed to this Statement as Annexure-I for favour of kind perusal.

That on getting the copy of the D.O.letter No.538/C.J.Res dated 13.12.2006 issued by

Hon'ble the Chief Justice to the Law Minister, I found that the D.O. Number and the Date have been mentioned on the right side of the letter by hand by the Hon'ble Chief Justice. Normally we put the D.O. Number on the left side and the Date on the right side of the letter by typing out the same. Another aspect I noticed that when we type out any letter in computer, we justify the right side margin of the letter, but that was not done in the said D.O. letter."

(underlined for emphasis)

It is not understood as to how and why the letter was not typed in the residential office and why D.O. number and date was mentioned by the then Chief Justice and why he wanted to have a dispatch number. Still more surprising is that the office copies of the letter were not kept in file and only after this Court passed the order, the copies were handed over to the Principal Secretary. This speaks volumes about the lack of transparency in the matter. Additionally, the letter of the Chief Justice addressed to the Government contains many wrong statements. The Law Minister had never suggested in his letter that a retired Judge was to be appointed. Therefore, the statement in the letter of the then Chief Justice that he agreed with the Law Minister that a retired Judge is to be appointed is totally misconceived. Further, the reasons indicated for taking a departure from the earlier practice of appointing sitting Judges also reveals some interesting factors. Only reason which can be inferred from the letter is that the workload has increased and the paucity in the number of Judges. The same was the position when the then Chief Justice suggested the name of a sitting Judge on his own even before the Government sought for views of the Chief Justice. On February 26, 2005, the Secretary to Government, Law Department, has noted in the note sheet that a letter had been received from the Chief Justice recommending the name of a sitting Judge to be nominated as the Executive Chairman. This was considered to be "in consultation" with the Chief Justice as required under Section 6(2) of the Act. The situation was not different when the then Chief Justice made the recommendation without awaiting a query from the Government. It obviously means that action of the then Chief Justice was not principle-oriented but was person-oriented. This is what is the main grievance of the writ petitioner. Surprisingly, even in the letter addressed to the Government, the then Chief Justice had suggested the facilities to be provided to the Judge concerned. This is not required as a part of the consultation process. Therefore, as rightly contended by the writ petitioner, there is ample scope for favouritism in appointment of a retired Judge.

In some cases earlier a sitting Judge was functioning as the Chairman of the State Legal Service Authority. We could not find any reason as to why a departure from the long standing practice of appointing a sitting Judge as the Chairman of the State Legal Service Authority was departed from.

Interestingly, in the affidavit of the State of West Bengal it has been stated as follows:

"\005\005.I further submit that the sitting Judges of the High Court are heavily burdened with judicial work and hardly it would be possible for them to afford

sufficient time for implementing the legal aid programme for the entire State. Secondly, if any sitting Judge of the High Court is appointed Chairman of the State Legal Services Authority, his post as Judge of High Court shall have to be kept vacant for his return at any time and the litigant public will suffer for such vacant post of Judge. On the contrary, if any additional post of Judge in the High Court is created for such purpose with additional staff that will involve huge financial liability on State exchequer without fruitful purpose. Moreover, the sitting Judge may not like to mix with general public who want to take legal aid. I say that there are 19 Districts including Kolkatta District in West Bengal."

The stands are not only confusing but also without any basis.

Another disturbing feature is that some of the State Governments have asked for panel of names to be given. Calling for such panel in essence results in substitution of objectivity with subjectivity. This is to be avoided. Though in terms of Section 6(2) retired Judge can be appointed, but that shall have to be in exceptional circumstances. The advantage of having a sitting Judge as the Chairman far outweigh the disadvantages, some of which have been highlighted by learned counsel for the States where retired Judges are appointed. Therefore, normal rule is that a sitting Judge should be appointed as the Chairman and only when unusual difficulties exist, a retired Judge may be appointed. That has to be the exception and not the rule.

In some States the retired Judges have functioned for some time. The concerned State Governments are directed to re-consider the matter with the consultation of the Chief Justice of the concerned State and do the needful within a period of four months.

The writ petition is allowed with the above-said directions. The original records filed by the different States be returned by the Registry.